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No. 03-367

Supreme Court, U.S.
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In The Supreme Court of the United States

DANIEL TURNER,

Petitioner,

v.

HOUMA MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT BELOW

Daniel Turner – petitioner

Houma Municipal Fire and Police Civil Service Board – respondent

Pat McKey – respondent

Timothy Wallace – respondent

Johnny Lopez – respondent

Joe Roy – respondent

David Falgoust – respondent

Craig Landry – respondent

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REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *PARRATT v. TAYLOR* AND *HUDSON v. PALMER*.

Petitioner has failed to set out a cogent argument for the single question that the Petition presents for review: whether the decision of the Fifth Circuit Court of Appeals is "contrary to this Court's holding in *Parratt*." Pet. at *i*. He argues that *Parratt* does not apply to this case, Pet. at 18, then predicts that "the viability of *Parratt* will be called into question" if this Court does not grant the Petition. Pet. at 22.

Nothing in the Fifth Circuit's decision conflicts with or is contrary to *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), or *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In *Parratt*, this Court held that a state actor's negligent deprivation of property does not give rise to a procedural due process claim under 42 U.S.C. § 1983 where the deprivation was random and unauthorized, and the state provided an adequate post-deprivation remedy. In *Hudson*, this Court extended *Parratt* to apply to intentional deprivations of property.[1] In affirming summary judgment against Petitioner's procedural due process claim, the Fifth Circuit relied on the fact that "Turner failed to pursue fully the remedies available

[1] Although the Petition frames the issue in this case in terms of *Parratt* alone, Respondents submit that *Hudson* actually controls the outcome in this case. Based on Petitioner's allegations of pervasive racial bias, the deprivation in this case, if any, could be construed only as intentional.

to him in the state court system," citing *Parratt* and *Hudson* App. A-2. This holding does not conflict with the *Parratt/Hudson* doctrine, which bars procedural due process claims for deprivation of property where the state provides a meaningful post-deprivation remedy. The fact that Louisiana provides a meaningful post-deprivation remedy, standing alone, bars Petitioner's claim under *Parratt/Hudson*. The Fifth Circuit implicitly acknowledged that Louisiana provides such a remedy when it stated that Petitioner failed to pursue fully those remedies. App. A-2.

As discussed infra in § III.A., Petitioner's real disagreement is with the Fifth Circuit's finding as a matter of fact that he failed to pursue to completion available state remedies.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW.

The Fifth Circuit issued its four-paragraph, *per curiam* decision in this case as an unpublished opinion, which that Court defines as an opinion that "merely decide[s] particular cases on the basis of well-settled principles of law." 5th Cir. R.47.5.1. The circuit court's rules also provide that an unpublished opinion is not precedent except under extremely narrow circumstances not present here.[2] The panel devoted only two sentences

[2] 5th Cir. R. 47.5.4 provides that unpublished opinions are "not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like)."

(and three citations, including *Parratt* and *Hudson*) to Petitioner's procedural due process claim.

Petitioner boldly argues that "the viability of *Parratt* will be called into question" if this Court does not grant the Petition. Pet. at 22. Such an overstatement cannot mask the fact that the decision in this case will not guide any court, including the Fifth Circuit, in deciding claims of future litigants. This case simply does not involve an important issue of federal law.

Construed in the light most favorable to Petitioner, this case would present nothing more than an example of "erroneous factual findings or the misapplication of a properly stated rule of law." This Court's rules recognize that such circumstances rarely support the grant of *certiorari*, S.Ct. R. 10.

III. THIS CASE DOES NOT PRESENT A SPLIT AMONG THE CIRCUITS.

A. Petitioner has disguised his challenge to a factual finding of the Court of Appeals as a split among the circuits.

The Fifth Circuit made a specific factual finding that "Turner failed to pursue fully the remedies available to him in the state court system." App. A-2.[3] The Fifth Circuit followed that factual finding with a legal conclusion: "Accordingly, Turner may not now seek relief from the

[3] This finding was appropriate in the summary judgment context, Rule 56(e), Fed.R.Civ.P., because Petitioner did not contest Respondents' factual assertion that Petitioner had failed to prosecute his appeal of either suspension.

federal courts. *Cathey v. Guenther,* 47 F.3d 162, 164 (5th Cir. 1995) (citing *Hudson v. Palmer,* 468 U.S. 517, 533 (1986); *Parratt v. Taylor,* 451 U.S. 527, 541-42 (1981))."

Turner attempts to dress up the Fifth Circuit's factual finding – that he failed to exhaust state remedies – in the clothing of a circuit court split on the issue of whether a plaintiff may escape the strictures of *Parratt/Hudson* and pursue a procedural due process claim in federal court by attempting to show that he was provided only a "sham" administrative proceeding. The Fifth Circuit's holding in this case does not present a difference of opinion among the circuits. It represents nothing more than a court's acceptance of and reliance on an undisputed material fact in the summary judgment context.

Petitioner suggests a circuit split based on two decisions of the Seventh Circuit, *Ryan v. Illinois Department of Children and Family Services,* 185 F.3d 751 (7th Cir. 1999), and *Levenstein v. Salafsky,* 164 F.3d 345 (7th Cir. 1998), and one decision of the Eleventh Circuit, *Adams v. Sewell,* 946 F.2d 757 (11th Cir. 1991), *overruled on other grounds by McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied sub nom. McKinney v. Osceola County Board of County Commissioners,* 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). These cases simply do not conflict with the Fifth Circuit's holding in this case, nor do they stand for the precise argument that Petitioner espouses in this Court.

In *Ryan v. Illinois Department of Children and Family Services, supra,* two former state employees sued under § 1983, claiming they were fired for speaking out about problems in their workplace. Plaintiffs argued that their post-termination hearings were a sham because the

responsible officials had already decided to fire them and therefore the hearings would be only a phony opportunity to contest the charges. The Seventh Circuit reversed summary judgment for the employer, holding that a "plaintiff who can introduce evidence that the decision has already been made and any hearing would be a sham is entitled to go forward with a procedural due process claim." 185 F.3d at 762. In *Levenstein v. Salafsky,* 164 F.3d 345 (7th Cir. 1998), the plaintiff professor alleged in his § 1983 suit that the procedures the university defendants used in forcing him to resign were a sham – the equivalent of no procedures – and that the decisionmakers had decided his guilt in advance. The Seventh Circuit held that plaintiff's allegations were enough to survive a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., and that "when the procedures used to investigate the charges are a sham through and through, there has not been a constitutionally sufficient opportunity to respond." 164 F.3d 345, 351.

The Eleventh Circuit addressed sham post-termination procedures in *Adams v. Sewell, supra.* The plaintiff in *Adams,* a former county employee, claimed that his post-discharge hearing was "a sham from beginning to end." 946 F.2d at 765. The Eleventh Circuit found that "the pre-termination problems were not 'cured' by the post-termination hearing, and reasonable jurors could find that the pre- and post-termination procedures provided by the County were inadequate." 946 F.2d at 766.

These three holdings of the Seventh and Eleventh Circuits are factually distinguishable from this case, and the issue addressed by those two circuits – the effect of sham post-termination proceedings – was simply not addressed by the Fifth Circuit in this case. The circumstances of this case are entirely distinguishable from the

Seventh and Eleventh Circuit cases. Here, Turner took no more than the initial step in prosecuting either appeal to *state district court*, an entity that is entirely separate from the Board that Petitioner alleged had racial motives. One can only surmise at this point that the state court might have granted Petitioner relief, especially in light of the fact that Petitioner alleged no bias on the part of anyone connected with the state court system, and that he received relief via mandamus from the state court on his later-abandoned appeal of his first suspension.

There is simply no conflict among the decisions of the circuit courts and the Petition should be denied.

B. Even if petitioner admitted that he is challenging a factual finding, the record contains undisputed evidence to support the Court of Appeals' factual finding.

The Fifth Circuit's factual finding that "Turner failed to pursue fully the remedies available to him in the state court system," App. A-2, was appropriate, based on the undisputed evidence in the record. Rule 56(e), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Petitioner claims that he "was never able to appeal the adverse decision [of the Board in January 1998 to suspend him] to the district court," Pet. at 12,[4] and that

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[4] Petitioner argues to this Court that both of the administrative hearings (one which produced a 30-day suspension, the other a 70-day suspension) were a "sham." Yet by his own stipulation in the district court and the court of appeals, any due process claim based on the first

(Continued on following page)

the Board "totally disregarded Petitioner's appeal" of the Board's second suspension in 1999. Pet. at 16. But the record confirms that – as to both suspensions – Petitioner voluntarily ceased his efforts to pursue available administrative remedies and did not prosecute either appeal to a final decision.

The 30-day suspension

As to the first suspension, the Petition states:

> Petitioner requested that McKey forward to the district court 'a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension . . . ' On May 22, 1998, Petitioner, after the passage of approximately four months and no response from defendant McKey, or the Board's attorney, filed a Petition for Writ of Mandamus. In a decision dated December 16, 1998, Judge Pettigrew ruled in favor of Petitioner, ordering the Board to 'forward a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the District Court. The court also awarded Petitioner costs, together with attorney's fees in the amount of $500.00. Respondents disregarded the

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suspension is barred by Louisiana's statute of limitations (prescription). *See* district court's Order and Reasons entered August 30, 2002, App. C-3 at n.1: "Turner conceded that any claims with respect to the 30 day suspension in 1998 are prescribed." Petitioner affirmed this stipulation in his original brief in the Fifth Circuit at 27: "As undersigned counsel stipulated during oral argument on defendants' motion for summary judgment, the claim pertaining to the January 6, 1998 hearing has prescribed."

> court's order. Respondent never forwarded a certified transcript of the record, or written findings of fact, and all papers on file in the office of the board pertaining to Chief Turner's suspension to the district court. Due to Respondent's recalcitrance, Petitioner was never able to appeal the adverse decision to the district court.
>
> Pet. at 11-12

But Petitioner fails to inform this Court that, on July 9, 1998, Respondents filed into state court both of the documents that the state court judge ordered the Board to file with the district court. Those two documents are entitled "Return" (which contains a list of "all of the documents in the possession of the City of Houma Municipal Fire and Police Civil Service Board concerning the hearing requested by Oswald Stoufflet which resulted in disciplinary action against Daniel Turner") and "Findings of Fact and Conclusions of Law." Attached to the latter document is a copy of a July 8, 1998 transmittal letter from counsel for the Board to counsel for Petitioner, which indicates that it was sent by fax and by regular mail. That letter states:

> Dear Mr. Wilson:
>
> Enclosed is a copy of the Findings of Fact and Conclusions of Law of the City of Houma Municipal Fire and Police Civil Service Board concerning the hearing requested by Oswald Stoufflet.
>
> On July 8, 1998 all documents of the Civil Service Board concerning this matter were filed with the Clerk of Court.

The two documents, as well as the July 8, 1998 transmittal letter, were attached as Exh. "L" to Respondents' motion for summary judgment, rec.doc. 73, and are part of the summary judgment record. Unfortunately, both documents bore the caption and docket number of Mr. Turner's suit for injunctive relief, *Daniel Turner v. Houma Municipal Fire and Police Civil Service Board,* No. 121384 (32nd Judicial District Court, Parish of Terrebonne), and were filed into the record of that suit, instead of into Petitioner's mandamus action, *Daniel Turner v. Houma Municipal Fire and Police Civil Service Board,* No. 122369 (32nd Judicial District Court, Parish of Terrebonne). Both of those identically-named suits were pending in the same court at the same time. But regardless of Respondents' clerical mistake in listing the wrong docket number on the caption of the two documents, the record indicates (and Petitioner failed to controvert) that both documents were faxed and mailed to Petitioner's counsel simultaneously with the court filing.

Armed with the foregoing two documents, Petitioner could have filed suit under La.R.S. 33:2501 in state district court challenging the January 1998 suspension. But the uncontroverted summary judgment record shows that he failed to do so.[5] Nothing in the record supports Petitioner's self-serving claim that he "was never able to appeal" the first suspension. Pet. at 12.

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[5] La.R.S. 33:2501E.(1) provides that any classified civil service employee "may appeal from any decision of the board, or from any action taken by the board under the provisions of the Part that is prejudicial to the employee. . . . This appeal shall lie direct to the court of original and unlimited jurisdiction in civil suits of the parish wherein the board is domiciled."

The 70-day suspension

With regard to his second suspension, Petitioner alleges:

> On March 9, 1999 Petitioner addressed and mailed two certified letters to Respondent McKey, appealing the Board's decision. Petitioner never received a response from the Board. The Board has totally disregarded Petitioner's appeal.
>
> Pet. at 16

Whether the Board "totally disregarded" Turner's appeal of his second suspension is of no moment. Even if the Board disregarded Petitioner's appeal, the evidence is uncontroverted that he took no steps beyond sending the Board two letters in the prosecution of his appeal of the second suspension. Indeed, the appeal was never lodged in state court, as contemplated by La.R.S. 33:2501E.(1). Petitioner implicitly suggests that the Board failed to comply with La.R.S. 33:2501E.(2), which requires that it file the transcript of the hearing with the district court after receipt of a notice of appeal. If so, Petitioner still failed to complete the appeal of his second suspension. With regard to his first suspension, Petitioner obtained mandamus relief, including an award of attorney's fees, directing that the Board comply with its statutory obligation to file a hearing transcript with the district court. His failure to take the same step with his second appeal bars his procedural due process claim.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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